In the Supreme Court of the United States

OCTOBER TERM 1940.

No. .....

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

ALBERT C. JOSEPH,
Administrator of the Estate of Wilma Winland,
deceased,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

OPINION OF THE CIRCUIT COURT OF APPEALS.

The opinion of the Circuit Court of Appeals for the Sixth Circuit is reported at 112 F. (2d) 518.

The District Court filed no written opinions.

II.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. 347(a)). The judgment of the Circuit Court of Appeals for the Sixth Circuit was entered June 11, 1940. The petitioner's petition for rehearing in that court was filed July 8, 1940, and denied November 15, 1940.

III.

STATEMENT OF THE CASE.

A full statement of the facts surrounding the accident is contained in the opinion of the Circuit Court of Appeals (112 F. (2d) 518, 519-20, R. 211-213) (with one exception) and is set forth, and the omission of one material undisputed fact pointed out, in the petition for a writ of certiorari (*supra*, pp. 2-4), and for brevity such facts are not repeated herein.

In commenting upon those facts, the Circuit Court of Appeals said (pp. 520-1, R. 213-4):

> "* * * Taking the view of the evidence most favorable to Winland, we are nevertheless of the opinion that it was error to submit his case to the jury. The physical facts were such that, had he looked and listened with reasonable care, after stopping his car and before attempting to cross the tracks, as he testified and as the law required, he could not possibly have failed to see or hear the approaching train. * * *
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> "* * * According to his own estimate of the train's speed and the length of time his machine was in motion, the train must have been in plain view and less than 132 feet from the crossing when he started across.
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> "However, whether the exercise of reasonable care required Winland to look to the west any time after starting, it is clear that he should have done so when he started his car. At that time, he had an unobstructed view of the track for a distance of between 521 and 561 feet in the direction from which the train was approaching. According to his own estimate of the train's speed, it must have been visible between eight and nine seconds before it reached the crossing, and, according to other evidence in the case, it was visible more than twice that long. Yet, according to his own testimony, only two seconds elapsed between the time he started and when he was struck. The weather was clear, the temperature above freezing, the right front window of his car partially open, and there is no suggestion that he had any impairment of vision, or that there was anything to obstruct his view of the

more than 521 feet of track in the direction from which the train approached. We are of the opinion that no one could come to any conclusion other than that he failed to look to see whether a train was approaching from the west."

The Circuit Court of Appeals disposed of the respondent's case in two paragraphs of its opinion (p. 522, R. 216-7):

"In the appeal from the judgment in favor of Mrs. Winland's estate, other factors must be considered. It cannot be held as a matter of law that her injury could not have occurred had she exercised the reasonable care she was obliged to exercise to protect her own safety. *This required her to look and listen and warn Winland of any train's approach. She too must have seen the train if she looked as required by law*; but appellant had the burden of proving her contributory negligence and was unable to show that she did not warn Winland of the train's approach after she saw or could have seen it, or that she failed to take any step by which the accident could have been avoided. Cf. *Street Railroad Co. v. Nolthenius*, 40 O. S. 376; *Hocking Valley Ry. Co. v. Wykle*, 122 O. S. 391. The District Court did not err in submitting Mrs. Winland's case to the jury on the question of contributory negligence.

"Nor was it error in that suit to include the last clear chance doctrine in the charge to the jury, for, though she may have been negligent in not seeing the approaching train, it is possible that she was thereafter unable to extricate herself from the danger, and that appellant's employees *could have* become aware of her danger soon enough after her negligence ceased to have averted the accident by the use of reasonable care. Cf. *New York, C. and St. L. R. R. Co. v. Kistler*, 66 O. S. 326; *Pennsylvania R. R. Co. v. Crouse*, 286 F. 376 (C. C. A. 6)." (Italics ours.)

IV.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals for the Sixth Circuit erred in each of the following particulars:

1. In failing to reverse the District Court for its action denying petitioner's motion made at the close of all the evidence to arrest the evidence from the jury and direct the jury to return a verdict in favor of petitioner, and in affirming the District Court's action in this respect.

2. In failing to decide, on the factual evidence in the record, that the District Court erred to the prejudice of petitioner in instructing the jury upon the doctrine of "last clear chance," and in affirming the District Court's action in this respect, for, under the respondent's own evidence, it was clear that the negligence of respondent's decedent and petitioner was concurrent; nor were the facts susceptible of the construction that petitioner's agents, after they became aware of the perilous position of respondent's decedent, were thereafter negligent in failing to avoid injuring her.

3. The Circuit Court of Appeals erred in that, having decided that Thomas Winland was negligent as a matter of law, it failed to apply the law of Ohio which denied any recovery to Thomas Winland as a beneficiary in his wife's wrongful death action when it was manifest that the jury in the trial court had followed and applied the instructions of the District Court that unless they found Thomas Winland negligent, they should allow to him such damages as would fairly compensate him for the pecuniary value of her assistance and services, and in affirming the judgment of $15,000 against petitioner.

V.

ARGUMENT.

A. The Circuit Court of Appeals Erred in Failing to Decide that Respondent's Decedent Was Guilty of Negligence that Prevented Her Recovery.

There is a mandatory duty imposed by the law of Ohio upon a traveler crossing a railroad crossing at grade in that State to exercise his senses of sight and hearing for his own safety, and such a traveler is under a duty "to look both ways and listen for the approach of trains; and such looking and listening must be at such time and place and in such manner as will be effective to accomplish the ends designed thereby." *Pennsylvania Railroad Co. v. Rusynik,* 117 O. S. 530 (syllabus 1); and one who looks in the opposite direction from which the train that thereafter injures him is approaching and who fails to look in the direction from which the train is coming because his view is obscured (by smoke in that case) "proceeds at his own risk" and is guilty of such contributory negligence *as a matter of law* as will prevent a recovery (syllabus 3).

The place where such looking and listening must be done is "at the point that will effectively apprise him of danger, which point is *the last place where he could stop the conveyance which he is driving, in time to avert a collision with an approaching train.*" *Lang, Admx. v. Pennsylvania Railroad Co.,* 59 O. App. 345 (syllabus 1), Ohio Bar, December 26, 1938. In that case, at page 351, the court said:

> "In the recent case of *Detroit, Toledo & Ironton Railroad Co. v. Rohrs,* 114 Ohio St. 493, 151 N. E. 714, referring to such duty, it is said:
>
> " 'The duty is definite and is that he must look as well as listen, and that he must look from a point and at a time that will make the looking effective to apprise him whether danger is near or not.' "

In each of the foregoing cases the action was brought by the driver of the vehicle, but a passenger is also required

to use his senses of sight and hearing for his own safety under the circumstances.

In *The Hocking Valley Railway Co. v. Wykle,* 122 O. S. 391, in discussing a passenger's duty, the court said at p. 395:

> "* * * Hence, while one riding as a guest in an automobile is not charged with the duty of being on the lookout for possible dangers, such as devolves upon the driver of the automobile, yet when approaching a known grade railroad crossing *it is his duty to exercise his senses of sight and hearing* as would a person of ordinary care and prudence under the same or similar circumstances to observe the approach of a train and apprise the driver thereof." (Italics ours.)

The Circuit Court of Appeals for the Sixth Circuit in previous cases had imposed a similar standard of conduct on a passenger. *Fluckey v. Southern Railway Co.,* 242 Fed. 468 (C. C. A. 6), and *Erie Railroad Co. v. Hurlburt,* 221 Fed. 907 (C. C. A. 6). This latter case has recently been cited with approval by the Supreme Court of Ohio in the case of *Patton v. Pennsylvania Railroad Co.,* 136 O. S. 159, at page 165.

The only evidence in the respondent's case that dealt with the movements of the automobile or the action of its occupants prior to the collision was that of Thomas Winland, the husband of respondent's decedent and driver of the automobile. His testimony has been set forth in the petition for writ of certiorari, *supra,* pages 4-5. He definitely and repeatedly asserted that he *and the respondent's decedent also* were actively engaged in looking for trains before and at the time the automobile was crossing the two tracks of the petitioner. It is clear from the physical facts shown by the evidence and found by the Circuit Court of Appeals, concerning which there is no substantial dispute in the record, that from the point where Mr. Winland testified the automobile stopped, the occupants could see westward along the track a distance of 521 feet or more and

that this distance increased as the traveler approached the track on which the train was coming. Even if the petitioner's train had been approaching at a speed of 45 miles an hour (which is the highest estimate of the speed of the train that appears in the record), the train must have been in full sight of the respondent's decedent for at least eight seconds before the accident. During the time a train at that speed would have traveled some 528 feet. At the speed of the train estimated by petitioner's witnesses (and which is corroborated by the evidence of the distance it traveled before coming to a stop (R. 142)), it would have been in plain sight for more than twice that long. Yet Mr. Winland testified that it was only about two seconds from the time he started his automobile in motion until it was struck (R. 63), that he only traveled about 15 feet and that at all times while moving that distance he could have stopped his car "within a foot" (R. 63-4). He testified that *he and his wife both* looked both ways while the automobile was standing still, that they both looked to the east while crossing the westbound track and that the first time that either of them looked to the west after the car had started in motion was just as they were coming onto the eastbound track (R. 54-5).

> "* * * The looking should usually be just before going upon the crossing, or so near thereto as to enable the person to get across in safety at the speed he is going before a train within the range of his view of the track, going at the usual speed of fast trains, would reach the crossing. There should be such looking before going upon the track, even though there was a looking farther away when no train was seen approaching." *Railroad Co. v. Kistler*, 66 O. S. 326, 336.

It would be difficult to conceive of a clearer instance of negligence on the part of respondent's decedent than is shown by this record. The physical facts were such that the train must have been in plain sight at the time the automobile started in motion across the tracks and continued

to be in plain sight until it struck the automobile. The evidence of Mr. Winland is that Wilma Winland was also actively engaged in looking for a train. He was definite and emphatic on this point and there is no evidence to the contrary. The train came from the right side of the automobile. That was the side on which she was seated. She was in a position as good or better than her husband to see it, and she either failed to see it or if she did see it she failed to advise him of its approach. The Circuit Court of Appeals held that she was under a duty to look and listen and warn her husband of the train's approach (R. 216). Obviously the train was in plain view at the time she looked and was so close to the crossing that it reached it within a few seconds. Under such circumstances the statement in the case of *Detroit, Toledo & Ironton Railroad Co. v. Rohrs*, 114 O. S. 493, 502 (1926), *supra*, is particularly pertinent:

> "Surely it will not do for one to claim the right to recover simply because he has looked and did not see, if the conditions are such that, had he looked, he must have seen. When he says he did look, and the conditions establish the fact that any one who looked would have seen, then, if he says he did not see, his own evidence establishes the fact that he did not look, though he may think he did. To hold otherwise would simply be a manifest absurdity, and the doctrine that the traveler in a vehicle upon the highway when coming to a railroad grade crossing must look and listen might as well be abandoned if one so placed, in broad daylight, can say that he looked in a given direction where there was a locomotive moving toward the crossing, and not farther than 75 feet away, and that he could not see it."

It was also said in *The Baltimore & Ohio Railroad v. Heck, Admx.*, 117 O. S. 147:

> "In a suit for wrongful death occasioned by a collision between a railway train and an automobile driven by the decedent, at a crossing at grade of such railway and a public street, where the evidence at the trial tends to prove that the decedent looked just before

driving upon the crossing and tends to prove that the physical facts were such at the time that had he looked he would have seen the oncoming train, it is error for the court to refuse to give to the jury a requested charge, made in writing, before argument, to the effect that notwithstanding the jury finds the evidence to be that the decedent looked just before he drove upon the crossing, *plaintiff cannot recover if the jury further finds that the physical facts were such that had he looked he must have seen the oncoming train in time to have avoided the collision.*" (Italics ours.)

Nor did it appear that Mrs. Winland saw the train and warned her husband and that he ignored her warning. In fact, the only rational conclusion that can be drawn from his evidence is that no warning of any kind was given by her.

The Ohio rule with respect to the standard of care to be exercised by passengers approaching a grade crossing is set forth in the case of *Hocking Valley Railway Co. v. Wykle, supra*, p. 14, at pages 395-6. In substance, though a passenger is not bound to exercise as great a degree of vigilance as a driver, nevertheless, the passenger is required to exercise ordinary care and prudence for his own safety and is under a "duty to exercise his senses of sight and hearing as would a person of ordinary care and prudence under the same or similar circumstances to observe the approach of a train, and apprise the driver thereof." Under the facts of this case as shown by the evidence of the conduct of the occupants of the automobile and the physical facts of the nature of the crossing, it is too plain for serious doubt that Wilma Winland failed to perform the duty with which she was charged by law, of exercising due care for her own safety.

Mrs. Winland was not passively relying upon her husband to do whatever looking and listening was to be done but she herself was actively and independently engaged in looking for a train. The Circuit Court of Appeals for the

Sixth Circuit has said in such a case, to wit, *Erie Railroad Co. v. Hurlburt, supra* (p. 14):

> "Thus it appears that she had voluntarily entered upon the task of looking out for her own safety, and, if her evidence is to be believed, she was using her own eyes and ears for that purpose, wholly independent of her husband, *and was therefore responsible for her own personal negligence. Cotton v. Willmar & Sioux Falls Ry. Co.*, 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935; *Rebillard v. Minneapolis Ry. Co.*, 216 Fed. 503, 133 C. C. A. 9." (Italics ours.)

> "If both of them were engaged in looking and listening for a train, as they evidently were, then the negligence of each, while so engaged, must be regarded as the negligence of both of them. *Railroad v. Kistler*, 66 Ohio St. 327, 64 N. E. 130." (p. 910.)

To the same effect was the case of *Fluckey v. Southern Ry. Co., supra*, p. 14.

The Circuit Court of Appeals in its opinion stated (a) that respondent's decedent was under a duty to look and listen and warn her husband of any train's approach and that had she looked as required by law, she must have seen the train (p. 522, R. 216), and (b) that, under identical physical facts, Thomas Winland was guilty of negligence as a matter of law and could not recover (p. 522, R. 216). But the Circuit Court of Appeals then failed to apply the well established rule that prevails in Ohio that where the plaintiff's own testimony discloses negligence on his part directly contributing to his injury, or where the evidence offered in plaintiff's behalf fails to rebut the presumption of negligence arising therefrom, it is the duty of the trial court to sustain a motion for directed verdict in favor of the defendant. *Cleveland Railway Co. v. Wendt*, 120 O. S. 197, 203-4; *The B. & O. Railroad Co. v. McClellan, Admr.*, 69 O. S. 142; *C. C. C. & St. Louis Ry. Co. v. Lee, Admr.*, 111 O. S. 391; *Buell, Admx. v. New York Central Railroad Co.*, 114 O. S. 40. This Court has held in *Miller vs. Union Pac.*

R. Co., 290 U. S. 227 at p. 232 that, although the burden of proving contributory negligence of plaintiff rests, in all cases, upon the defendant, yet if such contributory negligence be established by plaintiff's evidence the defendant may have the benefit of it in sustaining that burden. The evidence of the conduct of respondent's decedent immediately before entering and while traversing the crossing appeared in the plaintiff's case. Certainly that evidence, which we have commented upon, *supra,* disclosed negligence on the part of respondent's decedent and there was no other evidence offered by plaintiff (and, in fact, none in the entire record) tending to rebut that presumption. In this state of the record we respectfully submit that it is not correct to say, as the Circuit Court of Appeals said in its opinion (p. 522, R. 217), that the burden of proving the negligence of respondent's decedent was on the petitioner and that petitioner had failed to maintain that burden.

It is to ignore the undisputed evidence in the record to conclude that petitioner had not affirmatively proved that respondent's decedent did not see the train until the instant before the crash, and thereby failed to perform her legal duty of exercising ordinary care for her own safety. Under the authority of this Court's decisions, to wit: *Erie Railroad Co. vs. Tompkins,* 304 U. S. 64 and *West et al. vs. Am. Tel. and Tel. Co.,* U. S. Sup. Ct. Nos. 44, 45, Oct. Term 1940, Decided Dec. 9, 1940, the Circuit Court of Appeals should have followed and applied the law of Ohio and reversed the District Court for its failure to direct a verdict for petitioner.

B. The Circuit Court of Appeals Erred in Deciding that the "Last Clear Chance" Doctrine was Applicable.

"Last clear chance" is only applicable when and if it appears from the evidence that a plaintiff had negligently placed himself in a position exposed to danger and the defendant, *after becoming aware of plaintiff's perilous posi-*

tion, thereafter failed to exercise ordinary care to avoid injuring him. Before that doctrine (designed to excuse culpable negligence on the part of a plaintiff) may be invoked, the evidence must justify the conclusion that the plaintiff's negligence had ceased and that the defendant's negligence was subsequent to that of the plaintiff. It is not to be applied when the negligence of the plaintiff and defendant are concurrent. *Grand Trunk Railway Co. v. Ives,* 144 U. S. 408 (1892); *Chunn v. The City & Suburban Railway of Washington,* 207 U. S. 302 (1907); *Kansas City Southern Railway Co. v. Ellzey,* 275 U. S. 236, 241 (1927); *St. Louis Southwestern Railway Co. v. Simpson, Admx.,* 286 U. S. 346.

In the last case cited this Court, speaking through Mr. Justice Cardozo, said, at pages 350-1, in holding that "last clear chance" was not in the case:

> "* * * There is an absence of the essential factors that wake into life the doctrine of the last clear chance. In the first place, the conductor did not know any more than Simpson did that an order had been violated. He was distrustful of his memory, and was looking at the written orders at the moment of the collision. Negligent he may have been, but not recklessly indifferent to a duty to counteract *a peril perceived and understood. Woloszynowski v. N. Y. C. R. Co.,* 254 N. Y. 206; 172 N. E. 471; *Inland & Seaboard Coasting Co. v. Tolson,* 139 U. S. 551, 558. *In the second place, the negligence of the engineer (the plaintiff's decedent) and the negligence of the conductor were substantially concurrent.* The negligence of the engineer was a continuing one (*St. Louis & San Antonio Ry. Co. v. Schumacher,* 152 U. S. 77, 81), for he was under a duty from the moment that he went out on the main track to return to a place of safety. The negligence of the conductor in failing to give warning was not separated by any considerable interval from the consequences to be averted, nor is there any satisfactory proof that warning, if given, would have been effective to avert them. The transaction from start to finish must have been a matter of seconds only. * * * The several acts of neg-

ligence were too closely welded together in time as well as in quality to be viewed as independent. *Kansas City Southern Ry. v. Ellzey,* 275 U. S. 236, 241." (Italics ours.)

The "last clear chance" rule in Ohio has been defined in *The Cleveland Railway Co. v. Masterson,* 126 O. S. 42 (1932), syllabus 1:

"Where a plaintiff, by his own fault, has caused himself to be placed in a perilous situation, he may recover under the rule of the 'last clear chance,' notwithstanding his negligence, if the defendant did not, *after becoming aware of plaintiff's perilous situation,* exercise ordinary care to avoid injuring him." (Italics ours.)

And the Supreme Court of Ohio more recently said on the same subject, in *Brock v. Marlatt, Admx.,* 128 O. S. 435, 438-9:

"* * * The last clear chance rule has no application to any situation except where the injured party through his own negligence has placed himself in a position of peril. The doctrine presupposes his antecedent fault and negligence, as a result of which he is in a place of peril. His negligence does not absolve the defendant from liability, if, knowing such peril, defendant fails thereafter to exercise ordinary care to avoid causing injury. Such charge is not proper where the claimed negligence of the defendant and the contributory negligence of the plaintiff are concurrent."

"* * * Without fully reviewing the evidence in the record it is sufficient to say that in so far as the evidence indicated contributory negligence of the plaintiff's decedent it was continuing and concurrent with the acts of the defendant charged to have been negligent. It had not ceased for a sufficient time prior to the accident to enable the defendant, after she knew of the peril of the decedent, to avoid the accident, and *hence the rule of the last clear chance has no application and its injection into the case is prejudicially erroneous. Pennsylvania Co. v. Hart,* 101 Ohio St. 196, 128 N. E. 142." (Italics ours.)

Under the evidence in this case it is apparent that the negligence of respondent's decedent continued until practically the instant of the accident. At the speed the automobile was moving it could have been stopped clear of the track on which the train was traveling if respondent's decedent had looked to the west even while the automobile was crossing the first of the two tracks. Obviously, under such circumstances, it could not be said that the negligence of respondent's decedent had ceased a sufficient time before the accident so that petitioner's employees, after they saw that respondent's decedent and her husband were in a perilous position, could have successfully averted the accident. On the contrary, the evidence is clear that everything that could have been done by them was done to stop or retard the speed of the train.

At the time it first became apparent to the defendant's head brakeman that the automobile was not going to stop short of the track, the train was from 280 to 320 feet away. Even then the automobile could have been stopped clear of the track if the occupants or either of them had looked. The train, on the contrary, at that distance could not have been stopped short of the crossing. Everything that could be done was immediately done by the engineer to stop it, for he applied the air brake in emergency and turned on the sanders, immediately upon being advised by the brakeman of the presence of the automobile (R. 99-100, 125, 130). The brakeman warned the engineer to stop as soon as it became apparent to him that the automobile was not going to stop short of the track (R. 124). He was under no duty to give any such warning unless and until that fact did appear. In *Railroad Co. v. Kistler,* 66 O. S. 326, it was said at page 340:

> "* * * Or if the fireman and brakeman riding on the left side of the engine saw her, and saw and realized her danger in time to notify the engineer in time to enable him to so slow down or stop the train as to have prevented the injury, and failed to so notify the engi-

neer, such failure would be such negligence as would sustain a recovery; *but if, after it became evident to them that she was about to drive upon the crossing, there was not time to notify the engineer, and then time for him to so slow down or stop the train as to prevent the injury, there could be no recovery.*

"When the fireman and brakeman saw her driving toward the crossing, they had a right to rely that she would use due care and not go upon the crossing, and it was only when it became evident that she was going upon the crossing that the duty devolved upon them to notify the engineer, and if there was then time to save her, she should have been saved; but if it was then too late to save her, the injury was, as to the railroad company, an inevitable accident, and for such there can be no recovery." (Italics ours.)

This train could not have been stopped in less than 500 or 600 feet after the air brakes became effective over the entire train, which, according to the undisputed testimony, would be some ten or twelve seconds after they were applied (R. 142). At a speed of 20 miles an hour, the application of the air 320 feet west of the crossing would not bring the train to a stop until the locomotive had gone more than 500 feet over the crossing, for at that speed the train would travel from 300 to 360 feet before the air became effective over the entire train, and thereafter it would travel 500 to 600 feet more before stopping. If the train had been traveling at the higher speed estimated by Mr. Winland, the distance required for stopping would have been considerably greater. Obviously, under such circumstances, there was no failure of the defendant to exercise ordinary care after it "perceived and understood" the perilous position of respondent's decedent.

The opinion of the Circuit Court of Appeals states in part (p. 522):

"* * * it is possible * * * that appellant's employees *could have* become aware of her danger soon enough after her negligence ceased to have averted the accident by the use of reasonable care." (Italics ours.)

This Court and the Supreme Court of Ohio have unequivocally held that "last clear chance" is only applicable in any event where the *defendant actually was aware of* the plaintiff's perilous position. *St. Louis Southwestern Ry. Co. v. Simpson, Admx., supra,* p. 20; *Cleveland Railway Co. v. Masterson, supra,* p. 21; and *Brock v. Marlatt, Admx., supra,* p. 21. That point was not reached until petitioner's head brakeman realized that the automobile was not stopping but was undertaking to proceed over the crossing ahead of the train, and, as he then testified, he immediately warned the engineer and the brakes were instantly applied.

The Supreme Court of Ohio has held, in *Pennsylvania Co. v. Hart,* 101 O. S. 196 (syllabus 1):

> "It is error for the trial court in his charge to the jury to charge the doctrine of 'last clear chance' where there is no evidence tending to prove a state of facts bringing the case within the rule."

and this statement has been reiterated and reaffirmed by the Supreme Court of Ohio more recently in *Brock v. Marlatt, supra,* p. 21. Erroneously injecting the doctrine of "last clear chance" into the charge to the jury permeates the entire charge and requires a reversal. Nor can a general verdict in such event be upheld under the so-called "two issue rule" in Ohio. *Cleveland Railway Co. v. Masterson,* 126 O. S. 42 (syllabus 5):

> "Where a general verdict is rendered finding for the plaintiff, and the trial court errs in its instructions regarding the duty of the defendant under the last chance rule, the two issue rule cannot be relied on to uphold the verdict."

It has also long been the rule in the United States Courts, independently of the rule in Ohio, that it is reversible error to charge on a theory alleged in the pleadings but not supported by substantial evidence. *Gerber, et al. v. Borderland Coal Sales Co.,* 5 F. (2d) 278 (C. C. A. 6);

Lynch v. United States, 73 F. (2d) 316 (C. C. A. 5); and *Carter v. Carusi,* 112 U. S. 478.

In *B. & O. Railroad Co. v. Reeves,* 10 F. (2d) 329 (C. C. A. 6), the court said (pp. 332-3):

> "The court also submitted the theory of 'last clear chance.' Defendant invited this, and could not complain of its mention; but for guidance in the new trial we should say that the undisputed facts show nothing to support this theory. The engineer was watching the auto approaching the crossing slowly and carefully (plaintiff says at 8 miles per hour), the view between the two was unobstructed, the railroad was in plain sight of the auto driver, and not until the auto came close to the track and did not stop did the engineer have any reason to suppose there was danger. Then he blew an alarm, but it was too late."

A similar comment might be made respecting the evidence in this case.

In this respect also the Circuit Court of Appeals should have applied the law of Ohio as it has been laid down in these Ohio cases and reversed the District Court for its failure so to do, *Erie Railroad Co. vs. Tompkins, supra,* and *West et al. vs. Am. Tel. and Tel. Co., supra,* or, in any event, have applied the limitations upon the "last clear chance" doctrine that have been recognized and applied by this Court in former decisions.

C. The Decision of the Circuit Court of Appeals Permits Thomas Winland to Recover for the Pecuniary Value of His Wife's Services and Assistance Even Though the Law of Ohio Denies a Negligent Beneficiary Any Recovery in a Wrongful Death Action.

The Circuit Court of Appeals held that Thomas Winland was negligent *as a matter of law.* Obviously the negligence of Thomas Winland was one of the contributing factors to the death of respondent's decedent. The respondent's petition embodies two causes of action, one (R.

p. 7) in the amount of $5,000 for Mrs. Winland's pain and suffering from the time of her injury until her death, a matter of approximately two days, and the other (R. pp. 5-7), the statutory action for her wrongful death in the amount of $25,000. In this latter cause the respondent sought to recover for the pecuniary loss sustained by Mrs. Winland's next of kin. The pleadings and evidence (R. pp. 7, 52) show without dispute that her next of kin were her minor child by a former marriage and her husband, Thomas Winland. The District Court was requested by petitioner's counsel to instruct the jury to indicate how much was allowed in the first cause of action and how much in the second cause of action (R. 181), but this the court refused to do. From the fact that the jury returned a general verdict of $15,000 and the pain and suffering cause of action was only for $5,000, it is apparent that at least $10,000 was allowed in the wrongful death cause of action. The Circuit Court of Appeals in its opinion (p. 522, R. 216) has held that the District Court should have directed a verdict for petitioner in the Thomas Winland case. Therefore the District Court in the instant case should have affirmatively charged the jury as a matter of law that in the wrongful death cause of action the jury could not allow any sum whatever in satisfaction of the pecuniary loss sustained by Mr. Winland on account of his negligence. This is clearly the law of Ohio. *Wolf, Admr. v. Lake Erie and Western Ry. Co.*, 55 O. S. 517 (syllabus 3):

> "In such actions (i.e., for wrongful death) the defense of contributory negligence is available as against such beneficiaries as, by their negligence, contributed to the death of the deceased, but the contributory negligence of some of the beneficiaries will not defeat the action as to others, who were not guilty of such negligence."

This rule of law was followed and approved in *Cleveland, Akron & Columbus Ry. Co. v. Workman, Admr.*, 66 O. S. 509, at page 545, and *Cleveland, Cincinnati, Chicago & St.*

Louis Ry. Co. v. Grambo, Sr., Admr., 103 O. S. 471, at page 478. Under *Erie Railroad Co. v. Tompkins, supra,* and *West et al. vs. Am. Tel. and Tel. Co., supra,* the District Court and the Circuit Court of Appeals are required to follow and apply the law of Ohio in this respect as well as in the other respects hereinbefore discussed.

The District Court, however, submitted both cases to the jury (R. 161) and charged the jury (R. 174-5) that in measuring the pecuniary loss suffered by Mrs. Winland's beneficiaries, the pecuniary value of her services and assistance to her husband should be taken into consideration by the jury unless the jury found that Mr. Winland was guilty of negligence directly contributing to the death of his wife. The same jury that brought in the verdict of $15,000 in this action, at the same time also brought in a verdict of $1,500 for Mr. Winland in his action, so that obviously the jury in the instant case did not find that Mr. Winland was guilty of contributory negligence, and, in accordance with the trial court's charge, included as a part of its verdict some sum to compensate the husband for the pecuniary loss he sustained by the death of his wife. It is presumed that the jury followed the court's instructions (*C. C. C. & St. Louis Railway Co. v. Grambo, Sr., Admr.*, 103 O. S. 471, 478) and, as they did not find Mr. Winland negligent respecting his own injuries, must have exonerated him from responsibility for the death of his wife. The Circuit Court of Appeals in its opinion held that Mr. Winland was *not* entitled to recover from petitioner for his own damages and said, after discussing the evidence: "We are of the opinion that no one could come to any conclusion other than that he failed to look to see whether a train was approaching from the west." (p. 520, R. 214-5) "* * * The District Court erred in not directing a verdict for appellant at the close of all the evidence." (p. 522, R. 216.) The Circuit Court of Appeals' decision in this respect was entirely warranted by the evidence, but its affirmance of the judgment for respondent in the instant

case presents a patent incongruity, for Mr. Winland, although denied any right to recover for his own physical injuries and property damage, is nevertheless permitted to recover his pecuniary loss for the wrongful death of his wife to which his negligence prominently contributed. Manifestly, the judgment in the instant case denies to petitioner the benefit of a defense to which it is entitled under the law of Ohio, namely, that "the defense of contributory negligence is available as against such beneficiaries (i.e., the husband) as, by their negligence, contributed to the death of the deceased * * *." (*Wolf, Admr. v. Lake Erie and Western Ry. Co., supra.*) The opinion of the Circuit Court of Appeals is silent on this point but it was expressly pointed out to the court in petitioner's petition for rehearing (R. 226-8) which was denied by a majority of the Circuit Court of Appeals (R. 237). Obviously, petitioner should be entitled to a reversal of the judgment of the Circuit Court of Appeals which affirmed the judgment of the District Court in this action.

CONCLUSION.

Petitioner therefore respectfully urges that the prayer of its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit in the instant case be granted and that petitioner may have the relief prayed for in said petition.

Respectfully submitted,

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